

1415363 (Migration) [2015] AATA 3561 (1 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Emilia Sawicka
CASE NUMBER:	1415363
DIBP REFERENCE:	CLF2014/31780
MEMBER:	Rosa Gagliardi
DATE:	1 November 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 01 November 2015 at 11:57am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 11 September 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 28 February 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa solely on the basis that the visa applicant did not meet cl.820.211(2)(d)(ii) because she could not satisfy Schedule 3 requirements and the delegate found that there were no compelling reasons not to apply them.
4. The applicant appeared before the Tribunal on 16 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence from Marcin Sebastian Wernicki, who is the applicant's partner. The Tribunal hearing was conducted with the assistance of an interpreter in the Polish and English languages.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

SCHEDULE 3 CRITERIA (CL.820.211(2)(D))

DOES THE APPLICANT MEET SCHEDULE 3 CRITERIA, OR SHOULD THOSE CRITERIA BE WAIVED?

6. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
7. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

CRITERION 3001

8. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
9. The applicant's migration history in Australia is as follows:

- She arrived in Australia on 20 April 2006 on a subclass 570 student visa which ceased on 14 August 2006. Departmental records show that the applicant has not held or applied for a substantive visa since 2006. She remained in Australia unlawfully for more than 7 years until she was granted a Bridging visa E on 28 February 2014.

10. For the purposes of this visa application the relevant day is, therefore, 14 August 2006 which is the last day on which the applicant held a substantive visa. The applicant lodged this Partner visa application on 28 February 2014. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

COMPELLING REASONS

11. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
12. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. The compelling reasons for not applying the Schedule 3 criteria must be reasons which are relevant to the purpose of permitting the person to make an application for a spouse visa in Australia: *Monakova v MIMA* [2006] FMCA 849 at [27]-[28]. The question of whether there are compelling reasons for not applying the Schedule 3 criteria must be considered in relation to circumstances existing at the time of application: *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 at [39].
13. The parties at the time of application and at the time of decision have claimed that at the time of application they were in a longstanding relationship of two years duration as at 28 February 2014 when the application was lodged. The Tribunal notes that the Department accepted that this was the case and the Tribunal also is prepared to accept that the parties had been in a two year de facto partnership as at 28 February 2012. This is because the parties submitted a letter from the person that was renting his place privately to the couple to state that they were living in his property "for a period of approximately 2 years from 2011 to 2013" as loyal tenants.
14. In addition the Tribunal has sighted evidence that the sponsor had made the visa applicant the beneficiary of his superannuation effective from 6 October 2013.
15. The Tribunal appreciates that the parties' arrangements appear to reflect a committed couple of two years' duration at the time of application. However, the Tribunal questions why the parties did not confront the issue of the visa applicant's unlawful status prior to letting it get to a point where she only did so because she wished to remain in Australia on the basis of her relationship with the sponsor. Clearly if they had been in a genuine and continuing spouse-like relationship prior to February 2014, it would have been open to the visa applicant to emerge from her unlawful status to attempt to remedy her situation. Instead, she continued to remain unlawfully in Australia until it suited her purposes to pursue a visa and confirm her relationship as it were.
16. The Tribunal therefore is not persuaded that there were compelling reasons for waiving the Schedule 3 criteria on the basis that in February 2014 she was in a longstanding relationship, given that she had not approached the Department to advise of her relationship until three or so years after she started living with the sponsor. Without something more the Tribunal is not satisfied that the length of the relationship of itself constitutes compelling

reasons for waiving the Schedule 3 criteria as it was always open to the parties to seek advice from the Department well into their relationship in order to regularise the status of the visa applicant.

17. In a letter to the Tribunal dated 29 July 2015, the applicant wrote to the Tribunal highlighting the extent to which the relationship was genuine and continuing and that *"being in Australia is a nightmare and huge stress is involved when you have to have eyes all around your neck. But at the time my priority was to support my family who needed my support as any other time in my life. More important than myself and my fears from the consequences I put my family existence. In Australia it is not easy when you have had (sic) overstayed, often uphill. Emigration is not paradise, and when you have no other choice you can hang to razor to stay afloat. Australia has the freedom of everything. Freedom without human criticism and attacks on private life. This is comfort, which is priceless. I would love to live in a free country which respects freedom and gives me choices. We would love to have our children to have that privilege to live in awesome country as AUSTRALIA is"*.
18. The sentiments expressed in the visa applicant's letter were also conveyed at hearing by the visa applicant. She stated that she had to support her family overseas who were going through a difficult time financially and that is why she remained in Australia for as long as she did unlawfully. It is not clear to the Tribunal, however, how this family crisis extended over 7 years and she could not have returned home when the crisis subsided. In any event, any work that the visa applicant conducted in Australia was conducted unlawfully and therefore the Tribunal cannot see her need to work as compelling reasons for waiving the Schedule 3 criteria at the time of application in February 2014.
19. In addition, the Tribunal's research shows that Poland is not without a social security system which protects people in times of economic or other difficulty. The social security system in Poland is basically split into 2 different insurance schemes [see: <http://guides.dess.au/guide-social-security-law/10/26/1/30>, accessed on 30 October 2015]:
 - The Social Insurance Institution (ZUS), and
 - The Agricultural Society Security Fund (KRUS).
20. ZUS is the main Social Insurance Institution for Polish employees. KRUS is the Polish Social Insurance Fund responsible for farmers. The ZUS started in 1927 and is divided into four groups:
 - Old age insurance;
 - Disability and survivors insurance;
 - Sickness insurance,
 - Work accident insurance.
21. If the visa applicant's family circumstances were difficult the Tribunal is unable to discern why the visa applicant did not work in a European Union country where she would have had the right of residency and possibly work, rather than remain in Australia unlawfully. The Tribunal does not accept that the visa applicant's only option was to remain in Australia unlawfully and that therefore at the time of application she was compelled to remain in Australia.
22. To some extent the issue of her unlawful conduct is not central to this review. It is not appropriate for decision makers to consider the non-waiving of the Schedule 3 criteria as a

punitive measure. The issue at hand is whether at the time of application, on 34 November 2014, there were compelling reasons for waiving the Schedule 3 criteria.

23. The applicant and the visa applicant do not have an Australian citizen child together, even though the visa applicant is now 38 years of age and claims she and the sponsor would like to have a child and start a family. The Tribunal has no reason to doubt that the parties do indeed wish to have a family but given the applicant's age the Tribunal considers that it was not outside the applicant's control to fulfil this plan earlier given the length of her relationship. If the applicant has medical issues to deal with in that regard then it has been open to her to seek medical assistance in the period she has been with her sponsor to start a family.
24. The Tribunal appreciates that the visa applicant's uncertain residency status may have deterred her and the sponsor from having a child earlier on in the relationship, but the Tribunal does not consider that the age of the applicant at the time of application constituted compelling reasons for waiving the Schedule 3 criteria, when she was 37 years of age. This is because the visa applicant could have had a child, returned to Poland and waited for her visa to be processed and then returned without difficulty. The Tribunal appreciates that this may have caused inconvenience and some upset to their daily lives and the sponsor may have been placed under extra pressure to support the visa applicant financially, however, the Tribunal cannot identify any reason why the visa applicant could not have stayed with her family in Poland for a period while she waited for her visa. The visa applicant misjudged her situation in Australia but the Tribunal finds that doing so does not amount to compelling reasons for waiving the Schedule 3 criteria at the time of application.
25. At hearing the sponsor stated that they had been caught by the change of law wherein they could no longer apply onshore. This is unfortunate for the parties but given that other applicants in this cohort would have similarly found themselves in this situation, the Tribunal is not satisfied that at the time of application this situation constituted compelling reasons for waiving the Schedule 3 criteria.
26. The Tribunal has noted that the parties have submitted a good deal of information pointing to them being in a genuine and continuing spousal relationship but the Tribunal does not accept that just because two people meet the requirements of Regulation 1.15A or Regulation 1.09A in this case, is reason to waive the Schedule 3 criteria on the grounds of compelling reasons. It is an essential requirement of the visa class that persons are in a genuine and continuing relationship and in this respect the Tribunal is not satisfied that the parties' emotional bond is reason to waive the Schedule 3 criteria, when many other applicants find themselves in similar circumstances.
27. In a submission to the Department, dated 22 July 2014, the applicant's migration agent wrote, including referring to the genuine and continuing nature of the relationship:

28. Since January 2012 the applicant and her partner have been recognised/accepted by their friends and families as partners. Partners are currently engaged and are trying to start a family. They live in their own house, share finances, household duties and see their relationship as long term.

29. If the applicant is requested to leave Australia sponsor would have to quit his job to be with his partner. The need to go overseas would have direct negative impact on family's financial situation and capacity to repay the loan on the house bought last year without experiencing substantial hardship. The visa applicant has been away from her home country for around 8 years; with about 15% unemployment rate in Poland it will be very difficult for her to find a job there, she will have to rely on financial assistance from her partner.

30. *There is a potential risk that in these circumstances sponsor as well as visa applicant may suffer significant psychological hardship.*

31. *Finally, Ms Sawicka has a strong connection with sponsor's grandmother Ms Elzbieta Zwolinski who is an Australian citizen and with whom she and partner lived with for about 10 months in 2012 and 2013.*

32. *Ms Zwolinski is a 83 year old woman. Visa applicant assists her with shopping and house cleaning. If Ms Sawicka needs to leave Australia Ms Zwolinski will definitely suffer from her absence.*

33. The Tribunal has sighted evidence that as 15 August 2012 the sponsor had a home loan application approved unconditionally and has no reason to doubt that the parties have not purchased a home together and that they had done so at the time of application, even though the Tribunal on the basis of the information before it cannot be certain that this was in fact the case. For the purposes of the review it will accept this to have been so.
34. The visa applicant and the sponsor at the time of application were well aware that the visa applicant's residency status in Australia was uncertain. To have forged ahead with making significant financial purchases in those circumstances was something they could have put off until the visa applicant's status had been resolved. It is also unclear why the sponsor could not for some twelve months or so have stayed with his grandmother at the time of application as he had in the past with the visa applicant and rented out his home to assist with the financing of the mortgage. The sponsor has been working so the Tribunal is unclear as to why the sponsor could not seek some arrangement with his loan provider to make interim financial arrangements while the visa applicant went offshore, or in the alternative have arranged his living circumstances to suit the situation he would have found himself in. The Tribunal appreciates that it would have been unsettling to have to make alternative financial and accommodation arrangements for the sponsor but the Tribunal is not persuaded that such a level of discomfort and upheaval constitutes compelling reasons for waiving the Schedule 3 criteria at the time of application.
35. The Tribunal has considered the migration agent's claims that at the time of application there was a potential risk that given their circumstances the parties may have suffered significant psychological hardship at being separated. At the time of application (and for that matter at the time of decision) the parties have not submitted convincing evidence that there were and are compelling reasons for waiving the Schedule 3 criteria on the basis of any vulnerability to mental health issues as advanced.
36. In terms of the sponsor's concerns that he could not have gone offshore with the visa applicant – this is not a requirement. There appears to be, on the evidence before it, no reason why the sponsor could not remain onshore and work to fulfil his mortgage commitments while the visa applicant waited offshore. Current communications media make every day communication accessible allowing parties to continue their relationship in a direct manner. The Tribunal is not underestimating that this would be difficult for two persons who are committed to one another, however, this is a requirement of the visa unless there are compelling reasons for waiving the Schedule 3 criteria.
37. That Tribunal has also had regard to the fact that the sponsor's grandmother may have enjoyed the assistance of the visa applicant at the time of application but there is no reason why the sponsor's family could not arrange assistance from within the community to assist her while the visa applicant is offshore.
38. The Tribunal appreciates that the parties will experience disappointment and some upheaval in their joint lives, however, the Tribunal is not satisfied that the parties could not have at the

time of application made arrangements to ensure they were not impacted adversely by any period of separation.

39. Notwithstanding the visa applicant's adverse migration history in Australia, the Tribunal would be supportive of any efforts to expedite the processing of the application offshore given the parties' wish to have children together. Fortunately, the visa applicant does not appear to be s.48 barred.
40. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
41. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

42. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.
- 43.

Rosa Gagliardi
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

SCHEDULE 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and

- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
 - (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
 - (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.